

JbfWterC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 In re Terrorist Attacks on
4 September 11, 2001

03 MD 1570 (GBD)(SN)

Conference

5 New York, N.Y.
6 November 15, 2019
10:30 a.m.

7 Before:

8 HON. SARAH NETBURN,

9 U.S. Magistrate Judge

10 APPEARANCES

11
12 COZEN O'CONNOR

Attorneys for Federal Insurance Plaintiffs

13 BY: SEAN P. CARTER

14 MOTLEY RICE, LLP

Attorneys for Burnett and Euro Brokers Plaintiffs

15 BY: ROBERT T. HAEFELE

16 KREINDLER & KREINDLER LLP

Attorneys for Ashton Plaintiffs

17 BY: JAMES P. KREINDLER

STEVEN R. POUNIAN

18 ANDREW J. MALONEY

19 ANDERSON KILL P.C.

Attorneys for O'Neill Plaintiffs

20 BY: JERRY S. GOLDMAN

JbFWterC

APPEARANCES CONTINUED

KELLOGG, HUBER, HANSEN, TODD FIGEL & FREDERICK, P.L.L.C.
Attorneys for Defendant Kingdom of Saudi Arabia
BY: GREGORY G. RAPAWY
ANDREW C. SHEN

SALERNO & ROTHSTEIN
Attorneys for Defendant Yassin Abdullah Kadi
BY: PETER C. SALERNO

MOLO LAMKEN LLP
Attorneys for Dallah Avco Trans Arabia Co.
BY: ROBERT K. KRY
ERIC R. NITZ

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
On behalf of Attorney General of the United States
William P. Barr
BY: SARAH S. NORMAND
JEANNETTE A. VARGAS
Assistant United States Attorneys

JbFWterC

(Case called)

MR. POUNIAN: Steven Pounian for plaintiffs.

MR. CARTER: Sean Carter for the plaintiffs.

MR. HAEFELE: Robert Haefele for the plaintiffs.

MR. KREINDLER: Jim Kreindler for the plaintiffs.

MR. GOLDMAN: Jerry Goldman, for the plaintiffs.

MS. NORMAND: Good morning, your Honor. Sarah Normand for the United States.

MS. VARGAS: Good morning, your Honor. Jeannette Vargas on behalf of the United States.

MR. RAPAWY: Good morning, your Honor. Gregory Rapawy for Saudi Arabia.

MR. SHEN: Good morning. Andy Shen for Saudi Arabia.

MR. KRY: Robert Kry for Dallah Avco.

MR. NITZ: Eric Nitz for Dallah Avco.

MR. SALERNO: Peter Salerno for defendant Yassin Kadi, your Honor, in case there's an opportunity for me to speak.

THE COURT: Thank you.

Welcome to all of the families and other members of the public who are here.

For the lawyers, let me remind you that in this absolutely beautiful courtroom that is large, the acoustics are awful. When you speak, please be sure to move the microphone as close as possible to you, not only so that I can hear you but the court reporter can hear you and create the best record

JbFWterC

1 possible.

2 We're here on a status conference to address a couple
3 of pending motions. I also have a few housekeeping matters
4 that I want to address.

5 I want to talk about the letter motion that the
6 plaintiffs had filed to compel the FBI to conduct further
7 searches, and I'd like to talk with the parties about the
8 nature of that dispute. And obviously in the submissions, the
9 FBI hasn't responded on the merits, so I think we're going to
10 need to set a briefing schedule on that.

11 The Kingdom has filed a letter motion requesting a
12 scheduling order going forward, which the plaintiffs have
13 responded to. I'm not prepared to set that order today, as the
14 parties know, but I may have a few questions and give you all
15 some direction to continue in your meet-and-confers.

16 Then I want to speak about a few housekeeping matters
17 so we can move this case forward in the most clear and
18 transparent way and so that everybody has their expectations in
19 the right place.

20 Let's begin with the letter motion that the plaintiffs
21 filed on October 24 that concerns the FBI's searching for
22 documents related to the third named subject of the FBI's
23 subfile investigation. Obviously, those arguments have been
24 set forth in the plaintiffs' letter brief.

25 I think, actually, rather than having Mr. Pounian

JbfWterC

1 begin, I think I'm going to ask the government to begin because
2 you haven't responded on the merits here, but let me ask you a
3 few questions.

4 Are your objections here related to -- why don't I ask
5 it in an open-ended way.

6 What are your objections here?

7 MS. NORMAND: Our objections, your Honor, aside from
8 not having the issues decided through summary briefing, are
9 that we are now in a position to litigate the issues relating
10 to the core records.

11 When we were here a year ago, in October of 2018, we
12 explained to the Court, as we had explained to the plaintiffs,
13 how the FBI had approached the core-records search and how the
14 FBI had approached its response to the subpoena; that is, by
15 gathering a group of core records to determine whether
16 information from those records could be released under
17 protective order.

18 As of this morning, I've provided what is an eighth
19 tranche of records, which substantially completes the FBI's
20 review of and processing of the core records. There are a
21 handful of items that are still being looked at, but very few,
22 and hopefully those will be resolved in a matter of weeks, but
23 we think that the FBI's core-records review and production is
24 substantially complete now.

25 When we were here in May and the plaintiffs asked to

JbFWterC

1 have briefing on certain discrete issues, the Court entertained
2 that request and had the view that we could have an initial
3 motion with regard to requests for additional discovery about
4 four individuals and the 2012 report, which we have now done.
5 We think that process has really identified that piecemeal
6 review of discrete aspects of the core-records approach and the
7 assertion of privileges is not the most efficient and practical
8 way of proceeding here.

9 We would like, and we think the best and most
10 efficient way of proceeding, is to have a global, omnibus
11 motion that addresses whatever disputes that the plaintiffs
12 have with the core-records approach. Those can include search
13 issues. Those can include, obviously, assertion of privileges.
14 But we don't think it's efficient or reasonable to continue to
15 have piecemeal motions.

16 THE COURT: Let me stop you for a second. As I
17 understand it, there are two pending motions. I believe
18 they're now fully briefed, awaiting for my decision.

19 MS. NORMAND: Yes.

20 THE COURT: One relates to these four individuals, and
21 the second relates to the assertion of privilege with respect
22 to certain documents by the government, and we'll get to those
23 motions as quickly as we can.

24 It's your view that even after those motions are
25 decided, there is another layer of disputes regarding, more

JbfWterC

1 wholesale, the nature of the FBI's searches that needs to be
2 resolved?

3 MS. NORMAND: I think that's the plaintiffs' view. As
4 we understand the plaintiffs' view, they don't agree with the
5 core-records methodology and search.

6 And if I could just back up?

7 A year ago, when we explained what the FBI was doing
8 to respond to the subpoena, it was very clear that the
9 plaintiffs were agreeing to this provisionally. They were
10 going to see how it went, see what records they got through the
11 core-records search; there was uncertainty, but after reviewing
12 whatever records they received, there would be an opportunity
13 to make whatever motions to compel they believed were
14 appropriate.

15 We are now at that point, and we understand the
16 plaintiffs to be disappointed with what they have received.
17 They don't believe, as we understand it, that the core records
18 were sufficiently inclusive, and they believe that some of the
19 material or perhaps a lot of the material that was withheld is
20 material that they're entitled to.

21 We have legitimate disagreements on those points, but
22 we think those are absolutely ripe for review.

23 THE COURT: It sounds to me, and maybe I have a
24 misunderstanding, but it sounds to me that at least with
25 respect to the plaintiffs' letter submission, their dispute, as

JbFWterC

1 I understood, was specific to this third main subject and not
2 sort of an omnibus dispute with how the FBI has conducted its
3 discovery writ large.

4 MS. NORMAND: I think they have both disputes, your
5 Honor, and obviously they'll explain them.

6 I do want to make the point that the FBI's search for
7 core records absolutely included a search for records regarding
8 the third main subject, so that is a misimpression that
9 hopefully has now been corrected. The search for records
10 regarding the third main subject also implicates the search for
11 records regarding the core records generally. Those are the
12 same issues, from our perspective, and if we were to brief the
13 adequacy of the search with regard to the third main subject,
14 we would be briefing, effectively, the FBI's core-records
15 search and why it's sufficient.

16 One of the reasons it's sufficient, your Honor, and
17 really the principal reason we think it's sufficient, is
18 because the premise of the core-records approach was that the
19 plaintiffs here had requested a vast amount of information
20 about a pending law enforcement investigation. A vast majority
21 of the information is privileged, and as a result, it does not
22 make sense to have the FBI search for and identify all records
23 in various category, whether they be about the four
24 individuals, the third main subject, the subfile. They want
25 all records about many, many topics.

JbFWterC

1 If, ultimately, the FBI's privilege assertions are
2 sustained as to the core records, which we believe are very
3 much representative of the types of documents that are most
4 pertinent to the Court's jurisdictional inquiry, if the FBI's
5 assertion of privilege is sustained as to the core records,
6 then that very much informs the analysis as to the search,
7 because the FBI's position will be, and is, that it would be
8 unduly burdensome to search for all records concerning four
9 individuals, all records concerning the third main subject.
10 And the reason that's unduly burdensome is not simply a matter
11 of volume, although that's part of it, and in many cases we
12 can't even reveal the full volume of records because that
13 itself would implicate classified information, but it's unduly
14 burdensome because the information is privileged. We would be
15 putting the FBI to this extraordinary burden of locating,
16 identifying, processing and withholding as privileged a large
17 volume of information for no ultimate purpose. It would be an
18 undue burden because ultimately that information is going to be
19 privileged.

20 THE COURT: It's the government's view, before we have
21 any briefing with respect to this anticipated motion, that I
22 first render a decision on the state-secrets privilege?

23 MS. NORMAND: We do think if the Court were to render
24 a decision on the state-secrets privilege, because those
25 categories of information are the same categories of

JbFWterC

1 information that are implicated in the rest of the records, we
2 think that if the Court were to render a decision on that
3 issue, that would very much inform the other issues, including
4 the issues raised in the instant motion, including the more
5 omnibus issues that we understand the plaintiffs seek to raise
6 at a later point.

7 THE COURT: OK. Thank you.

8 Mr. Pounian, you're taking the lead here?

9 MR. POUNIAN: Yes, your Honor.

10 The core of the jurisdictional discovery in this case
11 that was ordered by Judge Daniels was to determine who tasked
12 the two Saudi officials in California, Thumairy and Bayoumi,
13 who gave them the order to provide substantial assistance to
14 the hijackers in California, when they arrived, the first
15 arrival of the al-Qaeda hijackers in California. And we served
16 a subpoena in April of 2018 that specifically asked for
17 documents about Mr. Thumairy, Saudi official Thumairy,
18 documents about Saudi official Bayoumi and documents about this
19 third main subject, this third main criminal subject of the
20 investigation, who was the person who ordered Thumairy and
21 Bayoumi to carry out the support network for the hijackers upon
22 their arrival in the United States.

23 Now, we've received discovery about Bayoumi and
24 Thumairy over the past year. We've been engaged now, since
25 last November, when the documents were first produced by the

JbFWterC

1 FBI, and we have received certain factual evidence about
2 Bayoumi and Thumairy. That's been received over the past year.
3 We're not complete yet. There's more documents on a disk we
4 just received today, which I understand has 2,000 pages on it.
5 There are other items that we've asked for that are
6 outstanding, and there are other items on a list that we've
7 given to the government, and there may be another motion, your
8 Honor, regarding those items.

9 But the most critical matter, and the reason we
10 brought this to your Honor's attention so quickly, after we
11 heard, to our surprise, that they were not going to produce any
12 documents regarding this third subject, any documents regarding
13 the very core of the jurisdictional discovery in this case --

14 THE COURT: Is that actually their position to you,
15 that they're not producing documents as to the third subject?

16 MR. POUNIAN: They told us on September 30 in an email
17 exchange that they would not do any further searches for this
18 subject as of that time.

19 THE COURT: That's different than they're not
20 producing documents as to that person, because I think they
21 have produced documents.

22 MR. POUNIAN: To date, your Honor, all we've received
23 is the name. After the families went and met with the
24 President on September 11, the next day, we got the name.
25 That's all we got. And all we have otherwise, other than the

JbFWterC

1 name, is the report which had already been released three years
2 ago, that said redacted, you now know the name, tasked Bayoumi
3 and Thumairy with assisting the hijackers. And we also know
4 that a criminal investigation was opened by the FBI regarding
5 that third main subject.

6 But the FBI, with regard to that third main subject,
7 has not produced any of the evidence, any of the factual
8 evidence in the same manner that it has produced evidence as to
9 Bayoumi and Thumairy.

10 Now, we have a privilege log from them that lists 17
11 items, but it doesn't contain the factual evidence that was
12 assembled by the FBI. And when counsel says the core documents
13 included the third main subject, when we look at the only
14 evidence in the record, which is a declaration of Duel
15 Valentine that was submitted in June of this year, when he
16 described what the core-records search was, he said it was a
17 search for records regarding Thumairy and Bayoumi. That was
18 the government's position until, suddenly, on September 11th
19 and 12th, the name was released. And now they've had to
20 scramble and figure out what to do at that point in terms of
21 handling the situation.

22 Now, what we've heard now from the government is,
23 Well, the statement in the 2012 report that this person, this
24 third main subject, it was really an investigative theory; it
25 wasn't a fact. That's now the argument that's coming out of

JbFWterC

1 the woodwork from the government, and that's the argument of
2 Michael McGarry, the assistant director of the FBI, who's come
3 in and said that to this Court, even though he never worked on
4 the investigation itself. He was not involved in this
5 investigation, in this part of the investigation, certainly.

6 What we do know is that for the FBI to open a criminal
7 investigation into this third man, they had to have an
8 articulable factual basis. That's what the rules say. They
9 had to have facts, facts to show that this third man performed
10 some criminal act in furtherance of this conspiracy, in
11 furtherance of directing Thumairy and Bayoumi to assist the
12 hijackers.

13 In addition, the report itself says that there is
14 evidence. The report, on its face, says there is evidence, and
15 we submitted a declaration from an FBI agent who says FBI
16 agents don't use the word "evidence" lightly. It's not
17 something they toss around and say there is evidence. If there
18 is evidence, according to this agent, there would have to be
19 direct proof. If it was an opinion or a theory, they would
20 state it as such in the report. They wouldn't say there is
21 evidence.

22 Also, your Honor, on the privilege log that I
23 mentioned, there's another document. It's not as if the 2012
24 document is sitting isolated on its own. There's more.
25 There's a report from 2016.

JbFWterC

1 Now, I don't know if it's included on this. I doubt
2 it, but there's an FBI report from 2016, a review report, of 16
3 pages, not a summary report, like the 2012 report, but a review
4 report that goes through, evidently, the evidence. It's on
5 their privilege log, but it has not been produced. We don't
6 know whether it's going to be produced, and according to the
7 FBI, after the name of the third subject was declassified, they
8 were going to do a review of all of their documents, and that
9 was supposed to be done by October 28. We haven't gotten
10 anything yet. But that review, if they produce this document,
11 will provide further evidence regarding what happened in this
12 investigation, and perhaps that document could be sent to the
13 Court at least so the Court can know what actually happened in
14 this investigation.

15 At some point, the truth has to get developed within
16 this case, between the Court and the parties in this case.

17 Now, it's a very simple matter to determine the
18 documents that involve this third man. It's a matter of a
19 keystroke on a computer. They've said they can make a list of
20 every document from this third man in a matter of seconds.
21 They could provide that list to the Court. They could provide
22 it to the plaintiffs in the form of a privilege log. What
23 documents do they have on the third man? But the FBI won't
24 even tell us the number of documents about the third man,
25 because they say that's protected for some reason.

JbFWterC

1 There's never been a privilege log where you can't
2 find out the number of documents involving someone, because we
3 know already the person's name and we know what they did. So
4 why not have the evidence? Why not know the documents, the
5 number of documents and what the FBI did in its investigation?

6 THE COURT: To my question previously, is the scope of
7 your dispute with respect to just documents for this
8 individual, or is the scope of your dispute more globally how
9 the FBI conducted its review?

10 MR. POUNIAN: It's both, your Honor. We were waiting
11 until the last production, and I don't believe this is the last
12 production; I believe there are more items that are outstanding
13 that we have raised with the government in the list of
14 documents. But our plan was to review what had been produced,
15 and at that point, file another -- we probably will file
16 another motion on this issue, because the core documents that
17 have been produced, it's a very subjective standard. We have
18 no way of knowing what is going to be produced.

19 But with regard to this third man, the issue was so
20 clear, so discrete and so critical to the case at this time, we
21 thought there was no choice but to file this motion now and get
22 that issue resolved, just like back in April, we filed a motion
23 immediately after hearing about the four other witnesses that
24 we were trying to get information about. We immediately filed
25 a motion, and this Court allowed us to file the motion

JbFWterC

1 regarding the four Saudi government officials that we filed in
2 May of 2019. So that issue is before the Court now.

3 This issue also, we think, is of the same thing. And
4 if we had known back in April, as we pointed out in our papers,
5 your Honor, if we'd known back in April that this was going to
6 be an issue -- and we were led to believe in every way it was
7 not going to be an issue -- we would have brought the motion
8 back then. But because of the way this has developed, we did
9 not, and now we find out -- in September, October -- that the
10 documents are not going to be provided to us. And that's why
11 we believe it's urgent that we file the motion now.

12 THE COURT: But if it's the government's position that
13 they conducted this core-records search and produced all
14 responsive documents and you've received now your eighth
15 tranche -- and you'll go through those -- if it's the
16 government's position, as I think they've said, that with
17 respect to this third individual, if that was identified as
18 part of their review, they would have produced related
19 documents. And so it sounds to me like your objection is not
20 that they are withholding these documents but rather that there
21 was a flaw more globally in how they conducted their search.
22 If that's the issue, it seems that this application is subsumed
23 in the larger motion.

24 MR. POUNIAN: No, your Honor. It's both. It's both
25 issues. It's both withholding and the search that they made,

JbfWterC

1 because we believe that, as I said before, they did not include
2 within their search -- I don't believe they included the third
3 subject in their search. And the declaration of the FBI agent
4 who submitted a declaration in June, Duel Valentine, only
5 includes Thumairy and Bayoumi as part of the core-records
6 search that had been made by the FBI.

7 And may I say, also, there is no evidence. We have
8 evidence about Thumairy. We have phone records. We have
9 banking records. We have other factual evidence to show their
10 involvement. We have 302 statements. We have other items
11 regarding them that are relevant to the cases involving them,
12 involving the situation regarding them.

13 As to the third man, there is nothing, nothing except
14 the name, nothing except the 2012 report. That's all we have,
15 those two pieces of information. And now we have a privilege
16 log. And if we look at the privilege log, we don't see the
17 phone records. We don't see the banking records. We don't see
18 the other items of any normal criminal investigation that the
19 FBI would have had to collect on this third main subject. So
20 for them to come in now and say, Oh, we searched for everything
21 as part of our core-records search, it's just not there. It's
22 just not in the papers. It's not in the documents. And their
23 own agent, who submitted the declaration, didn't say I searched
24 for Thumairy, Bayoumi and the third man. No. He said I
25 searched for Thumairy and Bayoumi. That's all he said.

JbFWterC

1 So it's a question of not only the search but that
2 they have the documents and they're withholding them from
3 production. And I think it's essential that we get those
4 documents and get this issue cleared and resolved.

5 As I said also, there's this 2016 summary report.
6 It's actually a review report of the FBI that was prepared
7 after the 2012 report and provides the review of the entire
8 investigation, and we still have not received that document.

9 THE COURT: In a redacted form?

10 MR. POUNIAN: Not even in a redacted form, your Honor.
11 We just know that it exists. And we also suspect it mentions
12 Thumairy, Bayoumi, the third man, whose name has now been
13 revealed, others who we have identified before this Court who
14 are the subject of present motions before the Court. We
15 believe that all those names are mentioned in there, that they
16 must be, because we believe they're involved in this whole
17 support network for the hijackers, but yet it's being withheld
18 from production, and we think that is a critical document that
19 should be produced.

20 THE COURT: OK. Thank you.

21 MR. POUNIAN: Thank you, your Honor.

22 MS. NORMAND: Your Honor, I do need to correct some
23 just inaccuracies in the presentation of what was included in
24 the core-records search.

25 Counsel is simply misreading the declaration.

JbfWterC

1 Mr. Valentine made clear that the core group of records that
2 were gathered pertained to the issues as to which the Court had
3 allowed jurisdictional discovery, "which I understand" --
4 Mr. Valentine understood was "whether and to what extent,
5 Thumairy, Bayoumi and their agents took actions in 2000 at the
6 direction of more senior Saudi officials to provide assistance
7 to the hijackers."

8 I am representing to this Court, as I have represented
9 to the plaintiffs, that the core-records search included a
10 search for records regarding the third main subject. We were
11 well aware -- Ms. Vargas and I were actively involved in
12 assisting and coordinating with the FBI regarding the types of
13 searches that were appropriate. I am representing to the Court
14 that those searches included searches for relevant records
15 regarding the third main subject.

16 THE COURT: How do you explain, two things: one, the
17 language in the report that says "based on evidence"; and then
18 relatedly, Mr. Pounian's remarks that there are no 302 reports,
19 no phone records, banking records, the type of stuff that you
20 see with respect to Bayoumi and Thumairy and that you would
21 typically see in an investigation of this sort? Are the
22 documents being withheld on privilege grounds, or do they not
23 exist? Were they not searched for? How do you explain this?

24 MS. NORMAND: Your Honor, I'm not able to say in open
25 court or in an unclassified way precisely which records were

JbFWterC

1 searched for with regard to the third main subject or which
2 records were located. If the Court finds that important, we
3 are happy to make an *ex parte* submission to the Court to
4 identify which of the core records pertain to the third main
5 subject.

6 What I can tell you is that the FBI, looking at the
7 2012 report and the specific language that the plaintiffs are
8 relying on there, "tasked Bayoumi and Thumairy with assisting
9 the hijackers." Evidence. Whether it was evidence or whether
10 it was an investigative theory, that's not pertinent here. We
11 looked for it, and we included within the core records what
12 information we thought was being referred to as evidence in
13 that document, and it is being withheld as privileged. That is
14 exactly correct.

15 THE COURT: The evidence being withheld is privileged.

16 MS. NORMAND: Yes.

17 THE COURT: Is that the evidence that's part of the
18 underlying privilege motion? Or is that separate?

19 MS. NORMAND: It's related, your Honor.

20 The plaintiffs wanted to proceed with one document, so
21 we justified the privilege assertions as to one document. If
22 the Court looks at the attorney general's declaration and the
23 declaration of Michael McGarry, you will see that the
24 information that was withheld from that document falls into
25 four categories: subject information, information about the

JbFWterC

1 reasons for and results of the FBI's investigation; national
2 security investigations; sources and methods by which the FBI
3 gathers information and did gather information; and foreign
4 government information.

5 I have also represented that the core-records review
6 and production is now substantially complete. We made a large
7 production today. It's quite large, but most of the documents
8 are actually the grand jury records that were recently
9 authorized for release by the Court. That does largely
10 conclude the FBI's production.

11 There are a handful of discrete items that have been
12 requested that if we can find we will process. But we are
13 done. For all intents and purposes, we are done with the core
14 records. The plaintiffs gave us a list of all records
15 concerning this, all records concerning that, that they still
16 wanted and we said that's not consistent with the core-records
17 approach. We're not going to go back to the drawing board and
18 undertaking broad new searches. We should litigate any
19 disputes about the core records.

20 I want to emphasize that Mr. Pounian's concerns about
21 information that's being withheld and the propriety of those
22 withholdings, the privilege assertions, those are the very
23 issues that we think right now are ripe for resolution.

24 Mr. Pounian referred to the 2016 report that he
25 believes is important. Regardless of the contents of that

JbFWterC

1 report, that is a core record. It was reviewed by the FBI. It
2 was withheld in full. We are now prepared to brief whether
3 that assertion of privilege is appropriate.

4 To the extent that they have questions about what this
5 core-records search or they have disputes about what the
6 core-records search included or excluded, we should litigate
7 that now. It's the same issue, whether the FBI's approach was
8 sufficient as to the third main subject as whether the FBI's
9 approach was sufficient as to the core records generally.

10 If we were going to respond to a submission about how
11 the FBI's searched for records regarding the third main
12 subject, we would respond by telling you, Here's what our core
13 search was and here's why we did it that way and here's why
14 it's appropriate and here's why requiring the FBI to go back
15 and conduct all-records searches in all these various
16 categories would impose undue burdens here. Those would be the
17 same arguments.

18 I do want to emphasize why it's crucial that not just
19 the search issues be addressed but the privilege issues as
20 well, because it's fundamentally clear that the disputes
21 between the plaintiffs and the FBI at this point really have to
22 do with what determinations have been made about what
23 information will be produced. It was clear a year ago that the
24 FBI was reviewing the core records to determine what, if any,
25 information could be produced. We never committed to produce

JbFWterC

1 any particular records.

2 And I would note that when there were discussions in
3 August between the PECs, my office, the Department of Justice,
4 arguments were made by representatives of the plaintiffs, both
5 to my office and to the Department of Justice, that they wanted
6 the name: Please declassify the name; the name is important.
7 And they recognized in the course of those discussions that
8 additional information about the predication for the
9 investigation of the third main subject -- the evidence, the
10 sources and methods for gathering that evidence -- that those
11 aspects, those categories of information would raise serious
12 privilege issues and so they focused on the name.

13 So it should not be a surprise that the FBI has
14 withheld this information. I fully understand there's
15 disagreement, and we should brief those issues. The parties
16 have legitimate disagreements. We should brief the issues and
17 the Court should resolve them. But there's been no
18 misrepresentation. There's been no misleading.

19 From the very beginning the question was would the
20 core records be produced? And to the extent they were
21 produced, would privileges be asserted? And to the extent
22 privileges were asserted, were those appropriate privileges,
23 and if so, then that would let us know whether the core
24 approach was workable and was sufficient, because if, in fact,
25 the FBI is right that the evidence that's being described is,

JbfWterC

1 in fact, privileged, then it doesn't make sense to have the FBI
2 go back and search for all records identifying that
3 information, because we will know at that point that those
4 records are going to be privileged and that requiring the FBI
5 to go back and search for them would impose an undue burden.

6 I would like to say, and I think it's important, I
7 would like to make the point that over the past several months
8 there has been, I think, an elevation of the level of rhetoric.
9 There are legitimate disagreements between the parties here
10 that we think are appropriate for briefing. But we think both
11 sides should be treating each other with respect. We think
12 that it's important for the parties to be able to talk to each
13 other and make representations to each other and to act in good
14 faith.

15 We categorically deny that there has been any effort
16 to mislead or be evasive. From the very beginning, it was
17 clear, and I would point the Court to the transcript from the
18 October 2018 conference, in which Mr. Pounian acknowledged that
19 they were hopeful about the process of the core-records
20 approach; they think it was the best way under the
21 circumstances to proceed, "but we will not know until we get
22 the documents and we actually see them; there's some
23 uncertainty right now, but we're willing to proceed with that
24 uncertainty."

25 That process is now done. They had a sense of what

JbFWterC

1 the FBI is willing to produce. We should litigate those issues
2 in one global, omnibus motion that will then be highly
3 informative of all or any remaining disputes, if there are any.

4 We do think that the privilege assertions in the 2012
5 report are highly indicative of what the briefing would look
6 like as to the core records, so we do think that it should be
7 very clear that the categories of information that they now are
8 saying they want the FBI to produce are going to fall well
9 within those categories of records. And as the Court knows
10 from the process with regard to the briefing over the summer
11 and the fall, it's a cumbersome process to assert the
12 state-secrets privilege.

13 We asked for 60 days to complete that process. It
14 took even a little bit longer than that. If we have to
15 litigate this motion -- by our count, there are at least three
16 motions that the plaintiffs would like to make. They'd like to
17 make this motion about the third main subject. They'd like to
18 make a motion about the core-records search. They'd like to
19 make a motion, then, about withholdings in the various
20 tranches. That's at least three more motions. We have two
21 motions already pending. We think there should be one motion.
22 All the issues are inextricably intertwined, and when the Court
23 resolves that motion, that will be the most efficient and
24 effective way to proceed here.

25 THE COURT: Thank you.

JbFWterC

1 MR. POUNIAN: Your Honor, I don't think the Court got
2 a clear answer to the question that the Court asked about
3 whether documents were being withheld, whether they're all
4 listed on a privilege log or not. Looking at the privilege
5 log, the documents, the evidence is not there. We know the
6 name of this person, the third suspect. We know that this
7 third suspect was the person who initiated the order that set
8 in motion the 9/11 plot inside the United States. We know
9 that. And the government is saying that every document, every
10 piece of evidence about that person is privileged? Is that
11 what the government is saying? Or what? I mean, because it
12 makes no sense that the government is trying to hide the facts
13 regarding this third subject from the families and the American
14 people. It's just wrong, and it makes.

15 THE COURT: I actually don't think that's what she's
16 saying. I really don't. I think what she said --

17 MR. POUNIAN: Well, I was --

18 THE COURT: Sir.

19 MR. POUNIAN: I'm sorry, your Honor.

20 THE COURT: I think what she said was that she
21 included this person in the directive while they were
22 searching, they were fully aware of who this person was, it was
23 part of their process and to the extent the documents have not
24 been produced it's either because they don't exist or because
25 they are being withheld on privilege grounds, and I think the

JbFWterC

1 government's view is let's resolve those privilege grounds,
2 because if we just ask the question what about these particular
3 documents, we're going to run into those privilege issues
4 anyway.

5 MR. POUNIAN: In order for your Honor to resolve those
6 privilege issues, why don't we get a list of every document in
7 the FBI files with the third subject's name on it? Because
8 without that list we don't know what is being withheld from
9 production.

10 On the privilege log itself, we would, as I said
11 before, expect to see the evidence regarding this third main
12 subject, and the evidence is not there. It's simply not on the
13 log. So where is it? It's residing in a file within the FBI,
14 and we subpoenaed it back in April 2018 with a very clear,
15 specific subpoena. And your Honor, there's no reason to delay
16 this process regarding the third main subject, who is the key
17 person in this jurisdictional discovery dispute, one of the
18 three key people, any longer.

19 We can go and brief other issues later if those issues
20 arise, but this issue is here now, and it is an important one
21 for this Court to resolve, and we believe the Court should do
22 that as soon as possible.

23 MR. CARTER: Your Honor, could I just say one brief
24 thing, raised by a comment your Honor just made?

25 I want to be clear about what we understand the

JbFWterC

1 core-documents search to have been. We had expected, and there
2 was probably some misunderstanding on this point, but our
3 expectation was that a core-document search would have included
4 a comprehensive search of the subfile for documents about
5 Bayoumi, Thumairy and the third main subject. That's what we
6 understood a core document would be. My present understanding
7 is that the core-documents search involved agents familiar with
8 the investigation identifying documents that, in their view,
9 were of core relevance to the jurisdictional inquiry.

10 So, if your Honor's question is whether or not the FBI
11 conducted a search of the subfile to identify every document
12 relating to the third main subject and to assess whether those
13 materials are privileged, I do not believe that that has
14 happened. And that's why we're trying to bring the motion now,
15 because we think anything in the subfile about the third main
16 subject is of core relevance to the jurisdictional inquiry, and
17 we need to know if that universe has been assembled and that
18 there's been an assessment as to whether or not any of those
19 materials can be released. That's why we're getting to this
20 motion, your Honor.

21 MS. NORMAND: I can clarify a few points.

22 Mr. Carter is right that the core-records search did
23 not involve a search for all records about Bayoumi, all records
24 about Thumairy or all records about the third main subject.
25 And the reason for that is that would have been an

JbfWterC

1 extraordinarily burdensome approach, and we don't think we
2 would have been able to do it in any reasonable time frame.
3 That's the reason we chose the core-records approach, which we
4 do think we made clear from the beginning was a subset of
5 records that we thought, through discussions with the
6 investigators and a great deal of thought and effort, were of
7 particular relevance to the specific issues before the Court.

8 Those records include records about the third main
9 subject. They include what records we believed and information
10 we believed may have been what the 2012 report was referring to
11 as evidence. All of that work has been done. There has been a
12 decision by the FBI that the remaining information, including
13 the 2016 report, including the opening electronic communication
14 that identifies the predication for the investigation of the
15 third main subject, all of that is included in the core-records
16 search and included in either the privilege log or in
17 redactions.

18 But to answer the point about why they can't identify
19 it on the privilege log, there's a reason for that, and that is
20 because, as the attorney general and Assistant Director McGarry
21 stated in the declarations, and I do think for some of these
22 issues, your Honor, looking at those declarations and the
23 classified declaration in particular, would provide some very
24 useful background for the Court in evaluating some of these
25 issues. But the categories of information include things like

JbFWterC

1 the predication for a national security investigation, the
2 results of that investigation; sources and methods; foreign
3 government information.

4 If we were to provide, for example, a detailed list of
5 every document about the third main subject, that list itself,
6 possibly because of the volume, but certainly because of the
7 dates, the types of documents, the sources and methods that
8 would be revealed by identifying what those documents are,
9 would include information that falls squarely within the
10 categories of information over which the attorney general has
11 now asserted a state-secrets privilege.

12 So the answer to the question about why isn't it
13 listed on the privilege log is that we can't list on the
14 privilege log information that is itself privileged. That's a
15 basic principle. We're not required to do that.

16 If the Court wanted to test the notion that the core
17 records actually do include materials regarding the third main
18 subject, we are happy to provide an *ex parte*, classified
19 submission that will identify which of the core records address
20 that. But it is simply not accurate that the core records
21 don't include this information. Mr. Carter is right. None of
22 the categories of core records include all records about third
23 main subject, Bayoumi, Thumairy, or anyone else, and that's
24 because if we were to do that, we would have been here for
25 years. It's already taken a year for us to review and make

JbFWterC

1 determinations on the materials that have been produced.

2 And I would like to take a step back and make the
3 point that the FBI has produced an extraordinary amount of
4 material here, material that would not have been available
5 under the Freedom of Information Act, material that would not
6 be available in most cases, and they've done that because of
7 the extraordinary nature of this investigation. We've produced
8 witness statements. Witness statements are something that
9 would ordinarily fall squarely within the law-enforcement
10 privilege. We've produced them here under protective order.
11 We have produced materials that were covered by Federal Rule of
12 Criminal Procedure 16. We sought an application to have those
13 unsealed. We've sought to have other records unsealed.

14 We've produced a vast amount of information in this
15 case, and I do believe that the plaintiffs have found a great
16 deal of that information to be very, very helpful to them.
17 This is not a case where the FBI is withholding all the
18 information. We've produced a great deal of information in
19 what would be called the evidentiary category, but the material
20 that has been withheld has been determined by the FBI to be
21 privileged. And based on what we know about the attorney
22 general's assertion about the state-secrets privilege as to the
23 2012 report, the materials that have been withheld fall
24 squarely within those categories of privileged information.

25 At the end of the day, the time has come to litigate

JbFWterC

1 the documents as a whole. I mean, there's really no point in
2 talking about the FBI should be releasing the 2016 summary
3 report. We are saying to you and to the plaintiffs that
4 document's been withheld on privilege grounds. If they want it
5 and believe they're entitled to it, they should litigate that.
6 We shouldn't be saying, Go back to the well and look for more
7 documents as to the third main subject that are going to be
8 privileged anyway if the FBI's privilege assertions are upheld.

9 THE COURT: Thank you.

10 MS. NORMAND: Thank you, your Honor.

11 THE COURT: All right. I think I understand the
12 parties' positions.

13 Let me ask one question of Mr. Pounian.

14 If I were to conclude that the best way to proceed is
15 to issue my ruling with respect to the privilege issue that's
16 already fully submitted and then have the parties brief all of
17 these issues in one omnibus motion, as the government is
18 suggesting, I guess I have two procedural questions for you.
19 One is is it your view that that's a motion to compel that's
20 filed by the plaintiffs, or is that a motion for protective
21 order that's filed by the government? That's question 1.

22 Question 2 is -- and I think we need to review what's
23 on the disk and obviously you need my ruling on the
24 state-secrets privilege -- how soon could you file such a
25 motion? I do want to have everything, I think, within one

JbFWterC

1 motion here. The idea that you're sort of suggesting there may
2 be several other motions down the road, I think, is an
3 inefficient way for us to proceed.

4 When do you think this motion could be filed?

5 MR. POUNIAN: If the government is saying its
6 production is complete now, with the exception of several --

7 THE COURT: Sorry. You need to use the microphone.

8 MR. POUNIAN: If the government's saying its
9 production is complete, I think we'd be prepared to file a
10 motion in three to four weeks, your Honor.

11 THE COURT: OK. I take it that means motion to
12 compel?

13 One inquiry I have is -- and we did this the last
14 time, where, see if I can get the back-and-forth correct. I
15 believe the plaintiffs moved. The government asserted a
16 state-secrets privilege. The plaintiffs then felt like this
17 was the first time they were hearing it so they needed a
18 full-blown motion in response, which would ordinarily have been
19 a shorter motion, which then obligated the FBI to file a bigger
20 motion or a surreply, and I would like to avoid that, if
21 possible. So I'm wondering whether or not it makes more sense
22 for the government to go in the first instance.

23 MR. POUNIAN: It may, your Honor. It may make sense
24 in these circumstances.

25 THE COURT: I think that may be right. Maybe the best

JbFWterC

1 way to proceed is to ask the PECs to put in a short letter just
2 to the government what its position is and allow the government
3 to file the motion for protective order and you can respond in
4 full.

5 MS. NORMAND: Your Honor, typically, if the
6 state-secrets privilege is asserted, it's asserted in response
7 to a motion to compel so the government is aware of exactly
8 what the parameters are of the issues that are in dispute. We
9 think that was a helpful process the first time around, because
10 the plaintiffs identified in their initial motion what exactly
11 they were seeking, and in fact, as a result of their motion, we
12 actually met and conferred and narrowed a bit further. So I do
13 think there's a great deal of value in having the plaintiffs
14 move first and identify the issues, particularly when it comes
15 to the core-records search. We don't know. It would be
16 helpful for them to identify why they believe, what their
17 concerns are so that we can address them, your Honor, in our
18 motion. That's a challenge to the FBI's search, and we think
19 it's useful for them to do that first.

20 THE COURT: OK. Let me think about how to proceed.

21 MR. POUNIAN: Your Honor, we could provide a
22 summary -- not a summary, but a list of what we are actually
23 saying the government has not yet produced that the government
24 could then use as the basis for its protective order.

25 THE COURT: OK. Let me think about all of this and

JbFWterC

1 decide the best way to proceed and I will give you all some
2 instructions. And maybe a meet-and-confer on this topic
3 between you all makes sense.

4 I guess that's a nice segue for me just to reiterate a
5 point that the government made. I do feel like there's been a
6 heightened level of animosity and tension between the FBI, on
7 the one hand, and the PECs, on the other hand. I'm fully aware
8 of the nature of the relationship and the dispute, but I do
9 feel like over the last few months there has been an increased
10 sort of aggression that's just not productive. I know
11 everybody here is representing their clients vigorously and
12 everybody has interests, and I think everybody is representing
13 those interests in good faith. I wanted to just say that
14 because I do feel like we've gotten a little bit heightened.

15 I'll also make reference to the concern that was
16 raised in the letters about some public remarks that have been
17 made by the plaintiffs' executive committee lawyers. I don't
18 want to get into the back-and-forth of who's right and who's
19 wrong and what's public and what's not, but let's all be paying
20 attention here. There are all sorts of concerns in this case.

21 I appreciate and I'm always grateful to have the
22 families in the courtroom when you come, and I know all you
23 want are answers. Everybody in this room is doing their best
24 to get those for you, but there are very intense national
25 security concerns and public safety issues that I think were

JbFWterC

1 you even aware of them all, you would probably be a little bit
2 more sympathetic about some of the concerns that everybody is
3 operating under. Everybody has your interests in mind and the
4 desire for transparency, but that needs to be balanced with
5 concern for the safety of our country writ large, and I think
6 some of those issues are being animated here. I just want
7 everybody to be operating, at counsels' table, with heightened
8 sensitivity.

9 I will get back to you all on what we're going to do
10 with respect to that motion. I will say that my thinking right
11 now from the bench is that I should rule on the state-secrets
12 privilege and then we should have a full motion on whatever
13 outstanding issues are raised, and whether that motion is a
14 motion to compel or whether the PECs identify in some fashion
15 to the government what it is they're seeking and then the
16 government moves for a protective order, I'll think a little
17 bit more about that.

18 Let me just give a heads-up to the government that
19 this issue is going to be teed up and so to the extent you need
20 to start the wheels of government on whatever privileges you
21 think you're going to be asserting, I would be doing that now.

22 MR. POUNIAN: Your Honor, may I mention one thing?

23 We had asked for oral argument on the state-secrets
24 issue before the Court and also the other motion that's pending
25 before the Court.

JbFWterC

1 THE COURT: OK. I'm not sure I'm going to entertain
2 that, but I appreciate your reminding me of your request for
3 that.

4 Let's talk briefly about next steps with respect to
5 the litigation against Saudi Arabia. I know that there are a
6 number of issues that were raised in the Kingdom's October 28
7 letter regarding the scope of discovery going forward and when
8 we could be wrapping things up. I also note there are a couple
9 of motions pending still that may affect the scope of discovery
10 and the Kingdom's obligations. Those need to be resolved
11 before we can move forward.

12 Mr. Pounian, are you going to take the lead on this
13 topic as well, or one of your colleagues?

14 MR. POUNIAN: I think we both are, your Honor.

15 THE COURT: OK. One question is is the gist of your
16 opposition to the Kingdom's letter that it's just too soon to
17 make any determinations about all of this? And I guess my
18 question for you is when will be the right time?

19 MR. POUNIAN: When the document discovery is
20 completed, your Honor.

21 THE COURT: By whom?

22 MR. POUNIAN: By the FBI and by Saudi Arabia.

23 We also believe we have to file another motion to
24 compel based on the most recent production of Saudi Arabia,
25 which we should be able to do in about two to three weeks also.

JbFWterC

1 THE COURT: OK. I've said this before. At a certain
2 point, we've got to close the doors, because we can't just have
3 constant motions to compel. Every production is going to
4 inspire you for further productions. Maybe the answer is to
5 start taking depositions and ask some of the questions that
6 you're asking the Court, meaning are there more documents and
7 start that process.

8 You write that you want to take 115 depositions, which
9 is not going to be authorized. But whatever the number is,
10 it's going to take a lot of time and we need to move into that
11 phase. I'm concerned about seriatim motions.

12 MR. POUNIAN: I understand, your Honor, but we don't
13 have control over the documents that are produced, and we have
14 to review them. It's been a long, laborious process to get
15 them translated, read them, understand them, and to see whether
16 they've actually responded to our requests. And if the
17 defendants are not responding to our requests, we have to file
18 a motion to compel. There's no option.

19 If we ask a request and they say they're going to
20 produce something and we get nothing, then there's no option at
21 that point but to file the motion to compel, and those
22 documents, we've proved, have shown that they're critical to
23 conduct the depositions properly.

24 THE COURT: The filing of motion to compel documents
25 the Kingdom has said they'll produce and then turned around and

JbFWterC

1 did not produce, or is it documents you believe exist and they
2 said we've looked for them and haven't found them?

3 MR. POUNIAN: We believe they exist.

4 There are also pending motions before your Honor,
5 motions for reconsideration that raise some of the issues that
6 the motion to compel now will raise.

7 THE COURT: Will you be guided by my decision in those
8 motions?

9 MR. POUNIAN: Of course, your Honor. Yes, of course.

10 And with regard to the number of depositions, we have
11 to take a large number of depositions because of the nature of
12 the case, the nature of the circumstantial evidence that we
13 need to assemble to prove our case and the complexity and the
14 fact that it's 20 years ago, and we're trying to determine
15 events that occurred in California and Washington and in Saudi
16 Arabia. It's a monumental task to assemble all of that, and
17 even though the issue here is one of jurisdiction,
18 quote/unquotes, under the JASTA bill, it goes right to the
19 merits of the case involving liability, causation, and the
20 issue of agency, which is at the center, as Judge Daniels
21 pointed out in his opinion.

22 So, it is a monumental task that we have to conduct
23 the depositions, and we want to be in the position to do that
24 with the documents that we believe should be produced to us in
25 the case. When we went ahead with depositions back in June, we

JbFWterC

1 then got documents in September and October that we should have
2 had at the time we took the depositions in June. So we kind of
3 got burnt on that occasion. We don't want to get burnt again,
4 and we want to just do the depositions once and not have to do
5 them multiple times.

6 THE COURT: I think everybody wants you to do them
7 once.

8 I've said this before. This case is obviously unique
9 and special, and so in some ways -- all of the history of civil
10 litigation is different -- and this case is different. This
11 case should be treated in a special way. That said, it is
12 litigation and you take depositions without all of the
13 documents and you take depositions without a perfect sense of
14 what you're going to learn during that deposition. A
15 deposition is just another fact-finding method, and so I
16 appreciate the monumental task. I really do. I'm deeply
17 involved in this case, and I realize the task that is presented
18 to you, but it may be that you have to take a deposition
19 without knowing everything, and that's just the way litigation
20 goes. At a certain point you will take a deposition and you
21 will feel like you don't have everything you want and you'll do
22 fine. Right? And so we need to figure out when we can decide
23 it's time to move on.

24 MR. POUNIAN: I believe, your Honor, that we need the
25 documents to resolve the issue concerning the documents

JbFWterC

1 regarding the third man before we can properly conduct the
2 depositions and know that we have evidence in hand or know that
3 we can't get that evidence before we can go ahead and conduct
4 the depositions.

5 THE COURT: I assume some of that evidence will affect
6 your selection of depositions, but some won't. Right? I would
7 like you and the Kingdom to be having conversations now about
8 people you know you're going to want to depose. And it may be
9 that there are certain people you can depose because they have
10 a particular category of information and you can start getting
11 some either foundational information or other background
12 information that's critical. You should be having those
13 conversations.

14 MR. POUNIAN: Yes, your Honor.

15 We do have two pending depositions right now, one of
16 Mr. Alzamari and the other one in Sweden from Mr. Abdullah.
17 There are two pending depositions that we have noticed, and we
18 are prepared to notice additional depositions but have been
19 waiting to get the documents. But your Honor is certainly
20 correct that we can proceed in some limited fashion with
21 depositions, and we are, with the witnesses that we can locate
22 and who are not related to other evidence in the case.

23 THE COURT: OK. Also, things like deposition location
24 seems to me an issue that can be discussed now.

25 Yes.

JbFWterC

1 MR. RAPAWY: If I may, your Honor?

2 I do want to say that I think it's going to be very
3 difficult for the parties to have constructive meet-and-confer
4 discussions about depositions if we are still so far apart on
5 the question of the number of depositions, because you said 115
6 wouldn't be authorized. I'm glad to hear that. They clearly
7 don't agree that ten, which we've proposed, is appropriate. So
8 if we start taking, without an idea of what the limit is -- a
9 limit of either the number or the amount of time -- then there
10 is not much of an incentive to focus on the depositions which
11 are most important to the case, which is the purpose that a
12 deposition cap usually serves.

13 I completely believe the plaintiffs are zealously
14 representing their clients in this matter, but we're just
15 really far apart in terms of what deposition discovery is going
16 to look like and who is appropriate -- you saw the witness
17 list, who's is appropriate to depose and how long this is going
18 to go on for.

19 Also, your Honor's aware of our position on whether
20 the entire process should await the conclusion of the FBI
21 production. We vigorously disagree with that, and we've said
22 in our papers there are instances in which I believe your Honor
23 has expressed a view that's consistent with ours. We do want
24 to get things started moving, but I think some guidance from
25 the Court would be helpful about numbers and about deadlines to

JbFWterC

1 focus those discussions on something that's going to have a
2 concrete result in the near future and will actually move the
3 case toward completion.

4 THE COURT: I agree.

5 I think what I'm going to do, and I'm not prepared to
6 give you that information now, but I think I'm probably going
7 to issue an order soon and ask to get a little bit more
8 information from the parties about what they are currently
9 thinking. This will be, in part, the way we develop the other
10 deposition protocol, in a way that I've operated in other
11 complex litigations, and that's to ask the parties to think in
12 a little bit more detail about the categories of information
13 they're seeking to explore and who they believe the appropriate
14 witnesses are for that area, and then we can look and see.

15 I'm just inclined to pull a number out of thin air,
16 but I'd like to explore exactly what works. I'd like to have a
17 better sense of the topics that we're looking for. I think
18 probably what I'm going to do is issue an order in the next
19 couple of days asking for some letters from the parties on
20 these particular issues.

21 MR. RAPAWY: Thank you, your Honor.

22 THE COURT: I think that is it with respect to the
23 substantive things. I just want to mention a few other
24 housekeeping matters.

25 The first is with respect to letter briefs. It's like

JbfWterC

1 you've gone off the rails about what is permissible and what is
2 not permissible. A party may file a five-page letter motion.
3 The opposing party may file a five-page response within three
4 business days, and the moving party may file a three-page reply
5 brief within two business days of the opposition. That is it.
6 I don't want surreplies. I don't want ten-page reply briefs.

7 Five-page letter motion, five-page opposition letter
8 motion and a three-page reply letter motion, and that's all.

9 Secondly, just as a heads-up, we have a standing
10 protocol about how documents are supposed to be filed on the
11 court docket that are subject to the FBI protective order,
12 which involves filing documents under seal, submitting proposed
13 redactions to the FBI, having the FBI get back to the party
14 seeking permission to file and then filing the document
15 redacted on the court docket. And I feel like that last part
16 is not happening.

17 I believe we have had a fair number of motions that
18 have been filed under seal and the redacted version has not
19 been filed on the public docket. We'll probably issue an order
20 in the next day or two on this issue, but I need everybody to
21 go back and look and see what they have done on this topic. To
22 the extent the logjam is the FBI getting back to the parties,
23 I'll ask you to be more timely on that. To the extent the FBI
24 is getting back -- that's OK.

25 To the extent the FBI is getting back in a timely way

JbFWterC

1 and then the moving party is failing to actually file the
2 redacted version on the docket, please pay more attention.
3 We're going to go look at our files, but it's our sense that
4 there is a fair number of documents that should be on the
5 public docket that are not.

6 I think that addresses everything. We'll get a couple
7 of orders out.

8 Does anyone have anything else they want to raise
9 before we adjourn?

10 MR. RAPAWY: On that last point, your Honor,
11 procedurally, I thought we needed an order from the Court
12 authorizing the filing of the redacted documents before we
13 could go ahead and file the redacted documents. Am I wrong
14 about that?

15 THE COURT: I think you are, but I will also go back
16 and check. I believe the FBI protective order governs the
17 protocol and that it authorizes the filing both of the
18 under-seal document and the filing of the redacted document on
19 the docket sheet once it's been approved by the FBI.

20 MR. RAPAWY: OK. That may be the cause of some delay
21 then. But the MDL protective order, we need an order from the
22 Court approving redactions.

23 THE COURT: Yes. We have a separate protocol as to
24 these documents that are governed by the FBI protective order
25 because of the nature of that production and the government's

JbFWterC

1 involvement.

2 MR. RAPAWY: I apologize for any confusion on that
3 point, your Honor.

4 THE COURT: That's all right.

5 MR. POUNIAN: I have one question on that same issue.
6 We've noticed, and I'm not sure we're correct or not,
7 that some parties are not filing their under-seal papers with
8 the clerk. I assume that's required in every instance, and we
9 want to make sure that the record is preserved with the clerk.

10 THE COURT: As do we.

11 Yes. To the extent that anyone's filing documents
12 that they are emailing, that's protected, and emails to
13 chambers need to be filed under seal. To the extent it's a
14 document that's being filed under seal because it discloses
15 information governed by the FBI protective order, you already
16 have permission to file it under seal. I believe the MDL
17 protective order does not give that blanket permission and you
18 need to seek leave from the Court in order to do so. But yes,
19 we want to make sure that we have a full record, including
20 documents that are being filed under seal.

21 MR. POUNIAN: To the extent that it's not been done in
22 the past, I would ask that your Honor include within your order
23 that the parties that have not filed documents under seal, that
24 they come up to date and do that so that the record can be
25 completed.

JbFWterC

1 MS. NORMAND: I'll just add that our understanding was
2 that the sealed materials that are reflected on the docket as
3 being placed in the vault were the materials that were being
4 submitted by email, so that was our misunderstanding. We will
5 certainly go back and compile everything that's been submitted
6 under seal and make an under-seal submission. And in the
7 future we will make those separate filings.

8 We apologize for that.

9 THE COURT: We want to make sure that the vault
10 reflects everything that was filed and that the public record
11 reflects everything that was filed. Some of those documents
12 are going to be redacted, but we should be working to limit
13 those, obviously, as best we can. But everything needs to be
14 in both categories: in the vault and under seal.

15 MR. RAPAWY: I'm sorry, your Honor.

16 Your individual practices have a passage about the
17 separate set of clean pages that are to be attached. I thought
18 that was the one that went to the vault. Again, maybe I was
19 mistaken about that.

20 THE COURT: We'll go back and issue an order so we can
21 get everybody on the same page. I don't want to speak about it
22 and confuse the matter more. I believe the FBI order has
23 separate protocols that everybody's operating under, but we
24 will issue an order about sealing to make sure that everybody's
25 on the same page, and we'll reiterate that to the extent

JbfWterC

1 anybody hasn't filed in both places, they need to do so. OK?

2 I have something unusual as well. My law clerk Dan is
3 leaving. He's been working on this case for the last 14
4 months, and he has been a huge help in keeping this case
5 running. We have another person coming in, and I'm sure he'll
6 be close to just as good. But Dan's been really terrific
7 working on this case, so I wanted to say a public thank you to
8 Dan for all of the work that he has done.

9 MR. RAPAWY: Thank you.

10 THE COURT: Thank you.

11 (Applause)

12 THE COURT: We're adjourned.

13 (Adjourned)